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Supreme Court, U.S.
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No._____

In the

Supreme Court of the United States

October Term, 1998

JOHN MURTARI, *Petitioner,*

-vs-

HIROMI MURTARI, *Respondent,*

On Petition for a Writ of Certiorari
To the Appellate Division, Fourth Judicial Department,
for the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the CPLR and Domestic Relations Law (DLR) of the State of New York violate the Federal Constitution when they prohibit a party in a divorce action from having a jury make a determination on the issue of child custody.

2. Whether the CPLR and Domestic Relations Law (DLR) of the State of New York violate the Federal Constitution when they do not guarantee a parent the right to representation by Counsel in a proceeding where the custody of their children is at issue.

3. Whether the CPLR and Domestic Relations Law (DLR) of the State of New York violate the Federal Constitution when they prohibit a party in a divorce action from having a jury make a determination on the issue of property distribution.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

John Murtari, Petitioner,
vs.
Hiromi Sumiya Murtari, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT, FOR THE STATE OF NEW YORK

Mr. John Murtari respectfully petitions for a writ of certiorari to review the judgment of the Appellate Division, Fourth Judicial Department, for the State of New York.

OPINIONS BELOW

The opinion of the Appellate Division is reported as *Murtari v. Murtari*, 673 NYS 2d 278 (1998 NY Slip Op 03968). The Court of Appeals decision is yet to be reported. Both are included in the Appendix.

JURISDICTION

The decision from the Appellate Division, Fourth Judicial Department, State of New York, was entered on April 29, 1998. An order, from same, denying reargument was issued on July 8, 1998. The New York State Court of Appeals denied review of the decision on August 31, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. (1257).

CONSTITUTIONAL PROVISION INVOLVED

The Domestic Relations Law (DLR) & CPLR for the State of New York prohibit the appointment of a jury in divorce proceedings on the issues of custody or equitable distribution. The CPLR also does not provide for the right to Counsel in a proceeding which will determine child custody in State Supreme Court.

The Petitioner prays the Court will review these restrictions, which also appear to be common among many states, in the light of the following sections of the U.S. Constitution:

Seventh Amendment - In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

Ninth Amendment - The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people ...

While Petitioner acknowledges the framers of the Constitution did not intentionally include "matrimonial" issues within these amendments, and that divorces were not then considered matters within the "common" law, but rather church law – he asks the Court to consider the present day frequency and ease of Divorce proceedings (and their devastating effect on families). Might this "evolution" have caused the "founding fathers" some concern. Especially when considered with those words from our Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

The Court has always held to the tradition that "Liberty" and "Life" rights deserve our greatest protections. What of "Happiness?" And what greater and purer "Happiness" can there be in life than the relation between parent and child?

Who among us, when faced with a Court proceeding in which we felt a Judge was about to unjustly limit contact with our children –

would not want the safety valve of a jury? Who among us would not want a presumption we be allowed equal contact with our children? Is not the right to the company of one's children/parents, a right preserved to the people?

STATEMENT

The parties were married on November 21, 1987 and have one son, Domenic, who was born on February 11, 1993. Respondent/Plaintiff commenced this divorce action in May 1995. After a non-jury trial in which defendant represented himself, New York State Supreme Court granted plaintiff a judgment of divorce (March 1997, Appendix B - page 38) on the ground of cruel and inhuman treatment; awarded plaintiff sole custody of the child with visitation to Petitioner/Defendant.

Substantial Federal Question Raised

The Petitioner/Defendant was granted "poor person" status in his appeal to the Appellate Division and specifically raised Constitutional issues at Trial and during Appeal (see Appendix K, Questions Raised, page 62), as allowed by State Law, regarding:

- Denial of counsel in a proceeding effecting the Custody of their child. See details in Appendix J, page 60.
- Denial of jury at trial (see Appendix I, page 58), and prohibition by the State CPLR & DLR (173) for a jury request on issues involving custody and equitable distribution in a divorce action.

Oral arguments were made, and the New York State Appellate Division unanimously affirmed the trial court judgment (April 29, 1998, Appendix D - page 44). A Motion for Rehearing at the Appellate Division was also denied (Appendix E - page 46).

Finality

Petitioner appealed to the state Court of Appeals on similar Constitutional issues (Jurisdictional Statement, Appendix G - page 52), and such review was denied by the Court on August 31, 1998 (Appendix H - page 57).

The Court of Appeals denied to take jurisdiction stating, "that the order appealed from does not finally determine the action within the meaning of the Constitution."

The appeal was from a Judgment and Decree of Divorce: a home was sold, the marriage was dissolved, and Petitioner lost any custody in their child. Petitioner asks the Court to exercise its discretion in determining "practical" finality.

A. Summary

The Petitioner understands the Supreme Court of the United States is not necessarily concerned with correcting errors that may occur in a lower court. The brief facts discussed at this point are meant to lay the foundation for later arguments regarding the necessity of a jury when the custody of a child is at issue.

A review of the Trial Court Findings (Appendix A - page 28), would seem to show a clear case of "inhuman" conduct; however, when looking at the actual conduct of the trial and the testimony – some might conclude there was a bias against the Petitioner even before trial began. This "bias" was aggravated by the lack of Counsel for the Petitioner, and could not be later cured by a trial in which there was no jury present.

B. Witnesses and Evidence at Trial

Plaintiff called two witnesses:

1. Haseo Sumiya, her mother, to testify regarding financial transactions.

2. Dr. Alice Hoenig, Psychologist, to testify regarding her mental state and the cruelty to which she had been subjected by her husband. She had never met Mr. Murtari in person, but based her testimony on a description of him supplied by the plaintiff. Dr. Hoenig latter accepted a Letter of Reprimand from the Central New York Psychological Association for her conduct in this matter.

The Defendant subpoenaed and had 18 people ready to testify at Trial. The Trial Judge blocked the testimony of 5 based on redundancy or lack of relevancy, but 13 eye witnesses testified as follows (none exhibited "hostility" toward either party in their testimony):

None of the witnesses in entire list testify to observing an hostile or disruptive conduct between the couple. Minimal cross examination failed to support any negative conclusions.

1. Mrs. Amy Murtari (Married to Cousin of Defendant, friend of couple).

2. Mrs. Mary Murtari (Cousin of Defendant).

3. Mrs. Mary Palliotti (Cousin of Defendant).

4. Ms. Rose Weaver (Friend of couple).

5. Ms. Elaine Pendergast (Broker who spent considerable time with couple during purchases of two different homes).

Following specifically testified to Defendants general demeanor and conduct.

6. Michael Sullivan (Director of Homeless shelter where defendant volunteers for past nine years).

7. Mr. Frank Forish (Deacon at parish, counselled defendant).

8. Ms. Betty Andrews (Nurse at Geriatric center where defendant volunteered for app. 6 years.

Following specifically testified to observing a warm relationship between between father & son.

9. Mrs. Cheryl Lidestri (Cousin of Defendant, friend of couple).

10. Mr. Jim Von Holtz (Neighbor)

11. Mr. Vincent Sneary (Worked with Defendant at his home business).

12. Ms. Peggy Timerson (Regular baby sitter for Domenic).

13. Ms. Sarah Roche (Director of daycare center where Domenic attended).

C. Appellate Decision in Error

Respectfully, Petitioner asks the Court to carefully review the Motion for Reargument (Appendix E - page 46).

- There was no other "overwhelming and convincing" evidence that affirmed the report of Dr. Black (who did not testify), and for who the Record on Appeal showed a pattern of obstruction and bias.

- The "failure to timely perfect an earlier appeal" was quite misleading. This was only addressed in oral argument, and had not been brought up by any of the parties in their briefs. The Petitioner had noticed an appeal prior to the start of the original trial – and had filed an order to show cause for a "stay" with the local Appellate Justice. This Judge had called the Petitioner at home, and explained the matter appeared untimely – that the Appellate Court could not "stay" a scheduled trial, and it might be best to continue with Trial, see what happens, and then appeal the judgment.

REASONS FOR GRANTING THE PETITION

Petitioner, in preparation of this writ, was surprised by the difficulty in finding a single Supreme Court or other Federal Court citation for a parent simply demanding the right to a jury in a proceeding effecting their relationship with their children. I was able to find some examples of state rulings, *Matter of Sean B.W.*, 381 NYS 2d 656 (Key Number: 230K19.10 - Trial by Jury/Domestic Relations) and the common rationale was:

- Custody/adoption proceedings were unknown at common law.
- There is no constitutional right to a trial by jury in custody proceedings.

As stated previously in this document's section on Constitutional Provisions. Petitioner prays the court will examine these issues in light of the evolution of divorce into just another civil suit between individuals. Like life & liberty, the decision to interfere with a child's relationship with a parent – should not always be left to one person.

This was "brought home" to the Petitioner when making oral argument in front of the Appellate Division. While speaking on the pain of separation for both parent and child, I was interrupted by the presiding Justice, who commented, "but you get to be with your child quite often I believe, every other weekend is a four day weekend." *I see my child 4 days out of every 14.*

Justices, what a personal question that was. One that really strikes to the essence of this petition. What burden of proof must be overcome before the "state" is allowed to force its "opinion" into one of our most personal choices. How would each of you and staff members answer that question when thinking about your own children, or your prior relationship with a loving parent. Would you have settled for 4 days out of 14, and considered that quite often?

In discussion with lawyers and professionals involved in the system – I have also heard remarks similar to the following:

• "Well, people want to protect their privacy in these matters – don't want a jury there" *This may be true in some cases. A jury is not required, but optional. A person accused of a crime, may overcome embarrassment to avoid an unjust prosecution. A parent, facing years of limited contact with their children, should have the same option. It does effect two people – but this may operate to encourage settlement and a negotiated agreement.*

• "It would be much more stressful for a child if required to testify with jurors present." *In our modern times, it would certainly be possible to videotape testimony of children for the jurors. In any case, are we doing a child a favor by avoiding a few hours of stress, but then condemning them to a childhood of separation from a parent.*

• "My God! The system is overloaded with cases as it is – how much slower will things get with juries present!" *With a presumption of an equal relationship between parents, and the hurdle of convincing a jury, beyond a reasonable doubt otherwise – it may encourage more settlements when an attorney can tell a client, "Look, you may not like your spouse, but they are not a threat to the kids and also deserve to be a parent – do you really think you can convince a jury otherwise?".*

•*Also, it may encourage state legislatures to pay more attention to encouraging realistic marriages. There appears to be so much attention to legislation fixing the effects of failed marriages – it may help to spend effort on pre-marriage classes prior to issuing a license, the development of "default" prenuptial agreements that future spouses could agree to do as is – or be free to modify.*

A. National need for "Miranda" rights for families.

The Court has exerted its power to protect those accused of crime, but what of parent's and children facing separation? So many parents have been "zipped" through the system, without ever really knowing what their real rights were (if any). A right to Counsel, a right to a Jury of your Peers – these need to become standards all are aware of.

B. Citizens have a right to a Jury determination in a proceeding effecting Child Custody.

Certainly, the right to a Jury is one of our most important right's in the Bill of Rights. The founders of our nation knew a "jury of your peers" was necessary to protect the freedom of its citizenry from unwarranted intrusion by the "State" – even if this is under the mask of "benign" intrusion, or "good public policy".

The extensive argument which follows highlights United States Supreme Court decisions which have upheld the special nature of the parent/child bond. It is but a natural extension this bond also be afforded the protection of a jury, and of a standard of proof "beyond a reasonable doubt" – that which we afford our most valued liberties.

The excerpt which follows has been edited for size and content, the substance of the brief was from a similar case in Wisconsin, permission was given by the attorney to use portions of the argument. The Petitioner did not do all the voluminous research referenced in the following argument. It has TWO major sections, first including "legal" research, next "social" research.

Dated: May 5, 1994

Copy permission granted by Travis Ballard, JD, Adrian MI

The Best Interests of the Child Requires Joint Custody

In recent years whenever the marital status of two parents changed from married to divorced the child loses one parent in most instances. In nine out ten cases, the child lives with the mother and "visits" with the father every other weekend. Dr. Richard Warshak, The Custody Revolution (1992). Indeed, this is so common that it is called "standard" visitation, In short, it is the arrangement that is meted out to children in the absence of compelling proof that some other arrangement would better serve the needs of the child. While the child is continually told that the divorce is "not your fault" the child is routinely punished by the change in marital status of his parents by the loss of one of those parents as a major factor in the child's life.

This brief takes the position that this current state of affairs is a destructive holdover of the prevailing cultural paradigms in existence at the time that divorce rates began to rise. The scientific evidence

concerning the results of these policies points clearly to the damage suffered by children and society when the relationship with either parent is significantly weakened. It further indicates that, contrary to the cultural assumptions in existence in the decade which spawned the high divorce rate, men and women are equally good at parenting and equally important to the well being of the child. **Finally, it is argued that any schema which impairs the parent/child relationship without clear and convincing evidence of a compelling state interest for doing so violate the Equal Protection and Due Process rights of both the parent and the child.**

Dr. Richard Warshak, America's leading expert on father custody, described the history of routine custody arrangements as follows:

"In earlier times it was assumed that men, by nature, are better suited to protect and provide for children. Since 1920, it has been assumed that women, by nature, are better suited to love and care for children.

"These assumptions, which so powerfully affect so many children's lives, are based on nothing more than folklore and sexual stereotypes .... As guidelines for custody dispositions, folklore, sentiment, and stereotypes are poor substitutes for factual information. In the last two decades, social scientists have examined different custody arrangements and their effects on children's development. If this information is ignored, and we continue to allow myth and sentiment to rule custody decisions, we short change our children and we short change ourselves."

Extensive evidence will be presented in this brief which indicates that it is imperative that the child/parent relationship with both parents be maintained as much as possible.

Unfortunately, current arrangement do not routinely maintain both relationships.

Indeed, the current policy results in a situation in which 42% of fathers fail to see their children at all after divorce. Frank F. Furstenberg, Jr. and Christine Winquist Nord, "Parenting Apart: Patterns of Childbearing after Marital Disruption," Journal of Marriage and the Family 47, no. 4 (November 1985): 874, cited in Sylvia Ann Hewlett, When the Bough Breaks (1991) at 286Ä87.

As the rate of divorce triples between 1960 and 1982 before leveling off at the 50 percent mark, a generation of children raised in fatherless families has been extensively studied. Despite the overwhelming evidence that children need both parents—even after the dissolution of a marriage— America has been slow to change the paradigm it holds which presumes that the post-divorce family will have only a single parent. "The main obstacle to progress is not ignorance, but the illusion of knowledge."

A. Only a Presumption in Favor of Joint Custody Accords appropriate respect to the constitutional protections surrounding the parent-child relationship.

The U.S. Supreme Court long ago noted that a parent's right to "the companionship, care, custody and management of his or her children" is an interest "far more precious" than any property right. May v Anderson, 345 U.S. 528, 533, 97 L.Ed. 1221, 73 S. Ct. 840, 843 (1952). In Lassiter v Department of Social Services, 452 U.S. 18, 27, 68 L.Ed. 2d 640, 102 S.Ct. 2153, 2159-60 (1981), the Court stressed that the parent-child relationship" is an important interest that 'undeniably warrants a deference and, absent a powerful countervailing interest, protection.'" quoting Stanley v Illinois, 405 U.S. 645, 651, 31 L. Ed.2d 551, 92 S.Ct.1208 (1972). See also Franz v United States, 707 F.2d 582, 594-602 and 712 F.2d 1428 (D.C.Cir. 1983) (interest of non-custodial parent in consortium with child constitutionally protected); Sherrod v Berry, 827 F2d 195, 207(7th Cir. 1987), parental association a constitutionally protected liberty interest.

This is not to say that courts should blindly or automatically impose joint custody arrangements. Clearly, there are many situation where joint custody is neither appropriate nor practical. Whenever a parent/child relationship is restricted by a family court order, however, such a restriction must be done in the least restrictive manner.

Maximizing time with each parent is the only Constitutional manner by which a parent is able to maintain a meaningful parent-child relationship after divorce. While geographic distance, school schedules and the like must be factored into the custody/visitation calculus, trial courts faced with a custody/visitation decision must accord appropriate constitutional respect to maintaining a healthy parent-child relationship by granting each parent as much time as possible with the child under the

circumstances of each case. "No bond is more precious and none should be more zealously protected by the law as the bond between parent and child." Carson v Elrod, 411 F. Supp, 645, 649 (1976).

Application of constitutional protections to custody/visitation rights is a necessary corollary to the Bill of Rights because individual liberty cannot be secured unless "certain kinds of highly personal relationships" are afforded "a substantial measure of sanctuary from unjustified interference by the State." See Karst, The Freedom of Intimate Association, 89 Yale L.J. 624 (1980). Providing constitutional shelter for a parent-child relationship simply reflects the realization that individuals draw much of their emotional enrichment from such relationships and that the sanctity of family relationship is "deeply rooted in this Nation's history." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

If there is any fundamental proposition of government on which all would agree, it is that one of the highest goals of society must be to achieve and maintain equality before the law. Yet this ideal remains an empty form of words unless rights are equally enforced. The appropriate manner for enforcing the constitutional right to a meaningful parent-child relationship after divorce is for courts to maximize the time the child spends with each parent absent compelling reasons to the contrary. "It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." Ashby v White 2 Ld. Raym. 938, 953 (1703).

In the Court of Appeal in Jermstead v. McNelis (1989) 210 Cal.App.3d 528, a statutory criteria for child placement in adoption proceedings of a "best interest of the child" was weighed against a parent's federal constitutional rights to a parental relationship with one's children:

"We are constrained to read section 7017,subdivision (d)(2) in a manner which avoids a potential for conflict with the federal constitution. [Citations omitted.] If read to bar a parental preference of a natural father who has appropriately grasped his custodial opportunity interest the statute would present such a conflict. The statute, as we said, lends itself to conformity with the constitutional concerns. In a case where the natural father has diligently sought to shoulder the burdens of the paternal relationship, including the burden of custody, the requirement of parental preference arises from the federal Constitution. Accordingly, the statutory criteria of section 7017

for the best interest of the child regarding retention of parental rights under the statute must be read in the light of this requirement. The statute admits of such an accommodation." Id. at 541.

Clearly the "best interests of the child" standard is to be read in light of the requirement that the parental-child relationship remain intact.

In those cases where joint custody is not ordered in a divorce setting, the parent without custody has been deprived of physical custody, just as in any other setting. The identity of the person who has custody of the child is irrelevant to the requisite proof required to deprive one parent of physical custody. Surely an action to determine whether a parental right should be retained is as fundamental to the parent child relationship as an action to terminate that relationship.

The impact these judicial decisions have on the lives of all concerned cannot be over estimated. Childhood passes rapidly and it quickly becomes too late to unring the bell. Expanded visitation or joint custody may seem unimportant, but only to those who have never experienced the hollow time of forced separation. "No human bond is cemented with grater strength than that of parent and child." Michelle W. v Ronald W., 39 Cal 3d 354 (1985).

Standard of Proof

Similarly in a Welfare and Institutions Code section 300 proceeding, the standard of proof before a parent may be deprived of physical custody of a child is clear and convincing evidence. (In re Katrina C. (1988) 201 Cal. App.3d 540, 548) The standard is the same when there is a supplemental petition to remove a child from a parent's physical custody under Welfare and Institutions Code section 387. (In re Fred J. (1979) 89 Cal.App.3d 168, 173-174)

In those cases where joint custody is not ordered in a divorce setting, the parent without custody has been deprived of physical custody, just as in any other setting. The identity of the person who has custody of the child is irrelevant to the requisite proof required to deprive one parent of physical custody. Surely an action to determine whether a parental right should be retained is as fundamental to the parent child relationship as an action to terminate that relationship.

The impact these judicial decisions have on the lives of all concerned cannot be over estimated. Childhood passes rapidly and it quickly becomes too late to unring the bell. Expanded visitation or joint custody may seem unimportant, but only to those who have never experienced the hollow time of forced separation. "No human bond is cemented with grater strength than that of parent and child." Michelle W. v Ronald W., 39 Cal 3d 354 (1985).

Seton Hall Professor Holly Robinson has spelled out this argument in detail:

It is accepted constitutional doctrine that the due process clause of the fourteenth amendment protects interests that are recognized as constituting "life," "liberty," or "property." In a number of decisions, the Supreme Court has recognized that individuals possess a fundamental liberty interest—entitled to constitutional protection—regarding such matters as the decision whether to have children, decisions concerning the upbringing of their children, and the retention of their children through exercise of custody. **Read together, the cases clearly establish a zone of privacy around the parent-child relationship, which only can be invaded by the state when the state possesses a sufficiently compelling reason to do so.** As a result, when the marital breakdown occurs, both parents are entitled to constitutional protection of their right to continue to direct the upbringing of their children through the exercise of custody. Adequate protection of this parental right requires that parents be awarded joint custody [or expansive visitation] ... unless a compelling state interest directs otherwise. H.L. Robinson, Joint Custody: Constitutional Imperatives, 54 Cinn. L. Rev. 27, 40-41 (1985) (footnotes omitted). See also, Ellen Canacakos, "Joint Custody as a Fundamental Right", Arizona Law Review, Vol 23, No 2 (Tuscon, AZ: University of Arizona Law College), Tuscon, 95721.

This proposition that the parent-child relationship in a traditional custody/visitation dispute commands constitutional al respect is admittedly lacking a long life of specific case authority approving it. This lack of specific case authority is not fatal to the proposition's vitality. At least one federal court has found that the paucity of cases recognizing the constitutional sanctity of this relationship is readily explained by the relative rarity of divorce in

American society in the past. That court further held that the historical absence of a strong tradition should not result in denial of the constitutional protection for such relationships as they become increasingly prevalent.

Maximizing the child's time with each parent is the constitutional mandate absent a compelling state interest of protecting the child from harm. There is no evidence that maximizing the child's time with both parents would cause the child any harm. The evidence is quite the opposite.

To further underscore the need for courts to consider the constitutional protections which attach in family law matters, one need only look to recent civil rights decisions. In Smith v City of Fontana, 818 F2d 1411 (9th Cir. 1987), the court of appeals held that in a civil rights action under 42 U.S.C. section 1983 where police had killed a detainee, the children had a cognizable interest under the due process clause.

The analysis of the court included a finding that "a parent has a constitutionally protected liberty interest in the companionship and society of his or her child. Id at 1418, citing Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985). In Smith the court stated: "We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents."

B. Overwhelming Research Favors Joint Custody as the Preferred Alternative

In all actions involving child custody of visitation the issue is. "What are the best interests of the child'?" or, in other words, "What disposition serves the best interests of the child?" See, e.g. Burich v. Burich, 314 N.W. 2d 82, 85 (1981). The most recent scientific evidence clearly demonstrates that paradigms of family law which do not give a preference to joint custody must be viewed as a threat to the best interests of children who find themselves with divorcing parents.

Research of the past decade has revealed new insights into how children of divorce are affected by the custody and visitation arrangements imposed on them by the family law courts of our nation. Numerous shibboleths about so-called impracticalities of joint custody

or expansive parental contact arrangements have been disproved. The evidence is simply overwhelming that joint custody or expansive parental contact is the optimal way to promote the best interests of the child.

The Children's Rights Council conducted a "comprehensive survey of more than 50 studies showing the greater risks (on a variety of indicators) for children raised in single- parent homes...whether the single parent is a father or a mother." D. Levy, Ed., The Best Parent is Both Parents, A Guide to Shared Parenting in the 21st Century, Children's Rights Council (1993) at p. 118, fn. 38.

The majority view of the psychiatric and pediatric profession is that mothers and fathers are equals as parents. See J. Atkinson, "Criteria for Deciding Child Custody in the Trial and Appellate Courts, " Family Law Quarterly, Vol. XVIII, No 1 (Spring 1984). A close relationship with both parents is necessary to maximize the child's chances for a healthy and productive life.

Dr. Richard Warshak described the results of the most recent research as follows:

"Much of the earlier work in infant development concerned the 'bonding' between the mother and child. Under the influence of the motherhood mystique, we had always assumed that these bonds were the exclusive providence of mothers and children."

We were wrong. **Numerous studies have established beyond a doubt that infants form close attachment bonds with their fathers and that this occurs at about the same time that they form attachments to their mothers.** Although father and mother usually play different roles in their child's life, 'different' does not mean more or less important.

***

Psychologists Ross Parke, of the University of Illinois, and Douglas Sawin, of the University of Texas...carefully observed fathers and mothers bottle-feeding their newborns. **They found that fathers were as sensitive as mothers to their baby's signals.** Fathers, like mothers, responded to their infant's clues by stopping the feeding for a moment, talking to the baby. and looking more closely to see what was wrong. Moreover, the amount of milk consumed by the infants with their mothers and fathers was nearly identical.

"Another series of studies has found that men—even bachelor college students—are as sensitive as women in discriminating among different crying patterns of infants. Whether or now we want to attribute these findings to a 'paternal instinct,' these, and many similar studies conducted at universities throughout the world, have established beyond a doubt that women have no monopoly on child-care skills."

Dr. Frank Williams, a leading authority on the effects of divorce on children compared joint custody to traditional visitation arrangements in his October 20, 1990, address in Washington, D.C. (2)

"It is the continued parental bonding, not the number of homes or vehicular travel, that will be the crucial determinant of children;s forward psychological development following divorce. In these days, when both parents frequently work, and rely on sharing the child-rearing with each other, with other family members, and with housekeepers and day care personnel, the concept of one 'primary psychological caretaker' is outdated. Frequently there are two psychological caretakers, or a network of caretakers, supervised by two parents."

The emotional stability of children of divorced parents is directly related to the quality of their continuing relationships with both of their parents. "We have repeatedly described the dissatisfaction of so many youngsters who felt they were not seeing their fathers often enough, If custody and visiting issues are to be within the realm of the 'best interest of the child,' then such widespread discontent must be taken very seriously. "J. Wallerstein and J. Kelly, Surviving the Breakup, 142-143 (1980) . See also, D. Luepnitz, Child Custody, A Study of Families After Divorce, (1983).

In a revised version of an address presented by Dr. Joan Kelly, who has performed extensive research on the effects of divorce upon children, at the annual meetings of the American Psychological Association in 1987, Kelly wrote:

"The primary negative aspect of divorce reported by children in numerous studies was loss of contact with a parent (Hetherington et al., 1982;

Kurdek & Berg, 1983; Wallerstein & Kelly, 1980, Warshak & Santrock, 1983). The traditional visiting pattern of every other

weekend, most often a maximum of four overnights spent with the father per month, created intense dissatisfaction among children, and especially young boys. Youngsters expressed profound feelings of deprivation and loss, and reactive depressions were frequently observed in young school-aged boys (Wallerstein & Kelly, 1980)." Id.

Indeed, sole custody arrangements with limited visitation by the non-custodial parent have resulted in children suffering a broad range of emotional disorders including deep feelings of loss and abandonment, strained interactions with both parents, disturbances in cognitive performance, and sex role identification problems. Trombetta, Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes, 19 J. Fam. L. 213, 217-20 (1980).

Researchers Alston and Williams noted that **"[a] significant relationship was found between father absence and self-concepts of the boys**. They placed less value on themselves, had less stable relationships with peers, less interaction with family members and showed a weaker scholastic performance. D. Alston and A. Williams, "Relationship Between Father Absence and Self-Concept of Black Adolescent Boys," Journal of Negro Education, Vol. 51, No. 2 (Spring 1982), 134-138. See also, Richard Koestner, et al.,

The importance of the father was again pointed out by Professor Daniel Shybunko in his 1989 study:

"... **The father-child relationship was found to be a good predictor of social competence regardless of marital status.** Moreover, the importance of the father-child relationship increased dramatically in the divorced family. This supports the view (Hetherington, Cox & Cox, 1978) that availability of the father is associated with positive adjustment and social relations, especially with boys." Daniel Shybunko, "Effects of Post-divorce Relationships on Child Adjustment", Children of Divorce:

The implications of the social science research on single-custody families was translated from bland, euphemistic terms of art such as "positive social behaviors" and "predictors of social competence" into graphic reality by Professor Stanley Page, while writing for a general audience:

"The homes lacking a father are, obviously, mostly the product of ... divorce ... Having opted for divorce as the solution to family and marital problems, our society has created a built-in child-destroying machine. And since there is not, as yet [in 1984], even the proposal of an idea for remedying the inevitably resultant distortion of the child-father relationship, we can be confident that the seeds of a vast army of sociopaths have been sown. Bred in fatherless homes and filled with boundless and amorphous rage for which they are not to blame, they will overrun this land. They are sure to make it even more uninhabitable for peace-loving citizenry already troubled by major breakdown in morality and by all manner of rampant vice and criminality."

One would expect that those divorce parents whose parental rights and responsibilities were felt most strongly would be where joint custody was ordered. Because both parents were still "members of the family", payment of child support should be higher where a paren-tectomy had been performed. In fact, "[t]he Census Bureau reported similar results in 1992, in the first survey it ever made on the relationship between joint custody, visitation and support. **The Census Bureau found that [parents] with joint custody paid 90.2 percent of their support, [those] with visitation paid 79.1 percent of their support, and [those] with neither joint custody nor visitation paid only 44.5 percent of their support."** U.S. Bureau of Census, "Child Support and Alimony: 1989," Current Population Reports, Series P-60, No. 173 (Washington, D.C.: GPO, 1991), cited in D. Levy, Ed., The Best Parent is Both Parents, A Guide to Shared Parenting in the 21st Century,, Children's Rights Council (1993) at p. 22, fn. 37.

The complex dynamics of childhood development within the context of divorce and recent scientific data related thereto strongly militate against the any paradigm that does not prefer joint custody arrangements. A simplistic guideline of alternate weekend visitation, although quicker to mete out, inevitably ignores the unique circumstances of each such child whose life will be shaped by the trial court's decision.

It is particularly important for a young boy to have significant blocks of times with his father as a male role model. Healthy social and personality development of young boys of divorce parents is directly related to the quantity and quality of interaction the boy is able to enjoy with his father. See Lamb, Michael and Sagi, Abraham,

Fatherhood and Family Policy. Lawrence Erlbaum Associates, 1983; Santrock, Warshak, and Elliott, Social Development and Parent-Child Interaction in Father-Custody and Stepmother Families Non-Traditional Families: Parenting and Child Development, ed. by Michael Lamb, 1982, Hodges, William F. supra.

Unfortunately, it is still a common phenomenon to see trial courts bound more by traditional methods of dealing with child custody and visitation questions rather than accept more progressive, modern approaches which better serve the best interests of the minor child.

Devices which are tempting for judicial expediency are poorly equipped to deal with the individual needs of children of diverse backgrounds who will have their lives so intimately shaped by the decisions of trial judges. What is called for is a policy which will expand the range of opportunities for children of divorce rather than one which imposes such narrow and restrictive limitations on these children.

Trial courts should endeavor to insure that children of divorce have the maximum opportunity for both physical and emotional contact with each parent unless direct physical or significant emotional harm to the child will result from this contact.

Dr. Isolina Ricci, Director of California Family Court Services and author of Mom's House, Dad's House, noted as early as 1980 that Given any voice in the matter, younger children will almost always choose the newer two-home alternative over the traditional one-home settlement with one parent consigned to the sidelines. The children I've worked with inevitably go straight to the heart of the issue, even when their parents are caught in tunnel vision of a 'real home.' When they 'visit' their non-custodial parent, they stake out territory ... They shy away from words like 'visit my Dad.' Instead, they say they're going to 'be with my Dad' or 'live with my Dad this summer.' An for good reasons: outsiders visit; families live together. Isolina Ricci, Ph.D., Mom's House, Dad's House; Making Shared Custody Work (1980).

A child's right to a relationship with both parents ought not to be compromised merely because of the marital status of the parents. The court in Franz v United States, 707 F.2d 582, 701 (D.C. Cir. 1983) held that "a parent's right to the preservation of his

relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his children. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him being raised by a loving, responsible, reliable adult." Id, at 599.

In Clark v Jeter, 56 U.S.L.W. 4527 (June 6, 1988), the U.S. Supreme Court held that "a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interests." Id at 1419. See also Strandberg v City of Lelenas, 791 F.2d 744 (9th Cir. 1986). Just as a child has a constitutional interest in the parent-child relationship if the parents never marry, so the relationship is protected if the parent' marriage fails.

APPENDIX A - Findings of State Supreme Court

At a Trial Term of the Supreme Court of New York, held in and for Onondaga County at Syracuse, New York on April 11, 12, 15, 16, 19, 1996 and September 27, 1996 and October 2, 1996.

PRESENT: HON. CHARLES T. MAJOR Justice of the Supreme Court STATE OF NEW YORK SUPREME COURT COUNTY OF ONONDAGA

HIROMI SUMIYA MURTARI,

vs.

Plaintiff,

JOHN MURTARI,

Defendant.

FINDINGS OF FACT CONCLUSIONS OF LAW

Index No.: M-705-95

R.J.I. 33-95-3267

The above entitled action having been duly brought on for a Judgment of Divorce in favor of the Plaintiff and against the Defendant on the grounds of Cruel and Inhuman Treatment (DRL§ 170(1)), and the Summons and Verified Complaint bearing the notation "ACTION FOR A DIVORCE" having been filed on May 23, 1995 in the Onondaga County Clerk's Office and duly served on the Defendant on June 27, 1995 and the Defendant having served an Answer and Counterclaim and the Plaintiff having served a Reply; and a Note of Issue and Index Number having been duly filed; and the matter having come to be heard for a Trial on April 11, 12, 15, 16, 19, 1996 and September 27, 1996 and October 2, 1996 before the HONORABLE CHARLES T. MAJOR, a Justice of the Supreme Court, and the Plaintiff having appeared with counsel, MAUREEN K. WALSH, ESQ., and the Defendant having appeared pro se, and the Law Guardian, JOSEPH A. LUPIA, ESQ. having appeared on behalf of the child and the Court having heard testimony from both parties and having received the report of the Law Guardian and the Court appointed evaluator, Lois Black, PhD, and having examined all of the evidence and prior pleadings in this matter and duly deliberated upon

the same, the Court hereby makes and files the following Findings of Facts and Conclusion of Law:

FINDINGS

1. That jurisdiction as required by §230 of the Domestic Relations Law has been obtained.

2. That the Plaintiff and the Defendant were duly married in Lyons, New York on November21,1987.

3. That there is one issue of the marriage; to wit: Domenic Kazu Murtari, born February 11, 1993.

4. That this action was commenced by the filing of a Summons and Complaint on May 23,1995 in the Onondaga County Clerk's Office and service of a Summons and Complaint upon the Defendant on June 27,1995 in the State of New York. A copy of the Affidavit of

Service was filed in the Onondaga County Clerk's Office on July 10,1995.

5. That this matter came to be heard for trial on April 11,12,15,16 and 19,1996 and September 27,1996 and October 2,1996.

6. That the Defendant has been guilty of cruel and inhuman treatment toward the Plaintiff and said conduct towards the Plaintiff has rendered it unsafe and improper for the Plaintiff to cohabit with the Defendant.

7. That the Defendant has committed the following acts of cruel and inhuman treatment:

a. That on many occasions throughout the marriage, and continuing to the present, such that it became a course of conduct, the Defendant Husband has been verbally and emotionally abusive towards the Plaintiff; that during the last five years, occurring with such frequency that the Defendant can not recall each and every incident, the Defendant has put the Plaintiff down, attempted to and did make her feel inferior, and is extremely critical of the Plaintiff's actions, friends, and parenting skills

b. That throughout the course of the marriage and continuing to the present, the Defendant has been extremely jealous of the Plaintiff and has on many occasions falsely accused the Plaintiff of being unfaithful; that in December 1994, the Defendant without the Plaintiff's knowledge or consent enclosed a form letter in Christmas

cards to friends and family stating that the parties were having difficulties and were going to be getting a divorce causing the Plaintiff great embarrassment.

c. That throughout the course of the marriage, the Defendant has repeatedly threatened the Plaintiff with Divorce if she did not do things exactly his way or if she did something that he did not approve of such as visit her family or further her career or put gift money from Plaintiff's family in a sole account.

d. That commencing in the Fall of 1991 and continuing until the Spring of 1992, the Defendant repeatedly told Plaintiff that he no longer loved her and Defendant doubted that he wanted to continue to be married; Defendant repeatedly told Plaintiff that if he had to do it over again, Defendant would not marry the Plaintiff.

e. That on many occasions since the birth of the child, DOMENIC, the Defendant insisted that it was "his time" with the child and forced the child to leave the Plaintiff even if the child was upset, screaming, and wanted to stay with the Plaintiff; that on one such occasion, on or about September 23, 1994, the Defendant grabbed the child who was screaming and reaching out to the Plaintiff and when the Plaintiff reached out to the child, theDefendant forcibly pushed the Plaintiff against the wall stating Plaintiff was lucky that the Defendant had self control.

f. That on or about December 24, 1994, the Defendant verbally threatened the Plaintiff stating that "bad things will happen" and "I will come to your room in the middle of the night."

g. That throughout the course of the marriage, the Defendant refused to socialize with friends of the Plaintiff and forced the Plaintiff to cancel social engagements or leave a social event early.

h. That the parties have not engaged in a sexual relationship since March 1994.

8. That as a result of the aforesaid acts Plaintiff has been rendered emotionally distraught, and suffered physical and mental pain

and anguish, and has experienced nervousness, stress, emotional anxiety, and sequelae therefrom, and the conduct of the Defendant has been such that it is unsafe and/or improper to continue the marriage or allow cohabitation with the Defendant.

9. Based on the extensive history of this litigation, this Court will retain jurisdiction on all matters including modification and enforcement of custody, visitation and child support.

10. Based on all of the evidence presented at trial including the recommendations of the Court Evaluator Dr. Lois Black, PhD. and the Law Guardian, Joseph A. Lupia, Esq. and my review of the various items of evidence introduced into evidence including the two videotapes produced by the Defendant of his interaction with the child Domenic, the Court finds that it is in the best interests of the child Domenic to grant sole legal and physical custody to the Plaintiff Mother, Hiromi Sumiya Murtari.

11. It is clear to the Court that the Defendant Father has great love for his son and should have substantial and liberal visitation. For reasons that the Court was unable to determine, the Defendant insists on control and domination of the child Domenic, as well as the Plaintiff. The Defendant does not understand the feelings or concerns of other persons, as observed by the Court throughout the trial, and all other related proceedings and as further described by Dr. Lois Black in her report.

12. The Defendant's visitation shall take place on alternate weekends from Thursday at 5:00 p.m. to Monday at 7:00 p.m. The Defendant shall transport Domenic to school on the Monday following the weekend he has visitation, when Domenic starts kindergarten. Additionally, the Defendant shall have five (5) weeks of exclusive visitation during the summer, but no more than three consecutive weeks at any one time; every Easter from Good Friday at 1:00 p.m. until Easter Sunday at 6:00 p.m.; every Christmas from Christmas Eve Day at 9:00 a.m. through December 26'h at 9:00 a.m.; every Father's Day from 9:00 a.m. until 7:00 p.m., and Memorial Day, Labor Day and Thanksgiving in odd years, President's Day, Fourth of July and Columbus Day in even years, from 9:00 a.m. to 7:00 p.m. Defendant shall be permitted to take Domenic to church on all Sundays and is allowed two hours to do so, to be computed between the hours of 8:30 a.m. and 11:30 a.m., except when the Plaintiff has Domenic during her summer vacation schedule to Japan or other trips to Japan or on other special occasions in which the Plaintiff is out of town.

13. The Defendant shall be allowed reasonable telephone contact with Domenic when at the Plaintiff's residence, and the Plaintiff shall be allowed reasonable telephone contact with Domenic when he is at the Defendant's residence.

14. The Court finds that it is in the best interest of Domenic to travel with the Plaintiff to Japan for four (4) weeks each summer, since Domenic is one-half Japanese, and exposure to his maternal grandparents and the Japanese culture will be beneficial to him. Plaintiff must notify Defendant by May 15' of each year as to when the summer Japan trip will occur. In addition, the Plaintiff may visit Japan with Domenic on special occasions once each year, but not for longer than ten days and the Plaintiff must give the Defendant thirty (30) days notice.

15. If the parties cannot agree upon transportation for visitation, the Plaintiff shall deliver Domenic to the Defendant at the beginning of visitation, and the Defendant shall return the child at the end of the visitation.

16. The Court further finds that the Defendant is disruptive at the child care center, and is ordered restrained from visiting the child care center at any time. Once Domenic starts Kindergarten the Defendant is no longer restrained so long as any visits are not disruptive and he has the permission of the school authorities.

17. Based upon the evidence, the Court finds that the marital residence located at 2404 Sourwood Drive, is marital property, made up by the contributions of both parties, including a substantial gift to both parties from the Plaintiff's parents. The exhibits received and sworn to by the Plaintiff's parents were not overcome by the testimony at trial. If the marital property is sold, each shall be entitled to one-half of the net proceeds. The house has an appraised value of $160,000.00, and a mortgage of somewhat less than $76,000.00. The Court estimates closing costs, including real estate commissions to be approximately $12,000.00. The Defendant has the option of purchasing the house from the Plaintiff for the gross sum of $37,000.00 within Sixty (60) days of receipt of a certified copy of the Judgment and Decree of Divorce and, if he does not choose to purchase the house, then the Plaintiff shall have thirty (30) days to exercise her option of purchasing the house from the Defendant for the gross sum of $37,000.00. To exercise their respective option, the parties must provide written notice to the other party by certified mail with return receipt requested. If either party is unable to obtain financing of the purchase within forty-five (45) days of exercising

their respective option, their option shall be null and void. If neither party exercises their respective option to purchase the house, then the house shall be placed on the market for sale, and sold within six (6) months, or then sold at auction, and the net proceeds to be divided equally between the parties. Defendant remains responsible for mortgage, taxes, insurance, utilities, repairs and maintenance until he vacates the premises.

18. The Court finds that Defendant is capable of earning income in excess of $40,000.00 per year and, as such, the Defendant shall pay child support in the sum of $120.00 per week, retroactive to October 1, 1995, plus a pro-rated share of child care and uncovered medical and dental costs for Domenic. The Court finds that the Plaintiff has an earning capacity based on her education and present employment of $26,000.00 per year. The Court determines the pro-rated share for child care and uncovered medical/dental expenses for the child to be 40% for Plaintiff and 60% for Defendant. Defendant shall receive a credit of $1,900.00 for child support paid on October 2, 1996.

19. The evidence shows that the Defendant has voluntarily chosen to decrease his income in an attempt to start his own business and to be in a position to spend more time during the day with Domenic. At the present time, his business income is unable to support his family obligations. The Defendant rejected job opportunities in the Spring of 1995, to continue this business which has proven to be an inadequate source of income. At this time the Defendant teaches part-time at Onondaga Community College and performs volunteer work. The time spent on volunteer work, no matter how commendable, could be better used producing income to support his financial obligations to the family. The Defendant must adjust his priorities in order to adequately provide for his family. The Court therefore finds that Defendant is able to work and obtain other employment, and, considering his experience, education and the Central New York job market, at a salary in excess of $40,000.00 per year. 20. The Defendant has further dissipated marital funds by withdrawing money from the G.E. Savings Plan, from the U.S.A.A. Mutual Fund, and sold a Honda vehicle for a total amount of $36,428.00, for which Plaintiff shali receive credit for one-half (1/2) that amount and Plaintiff is granted a Judgment for the amount of $1 8,214.00 against the Defendant. In addition, the Defendant has incurred credit card debt in the amount of $40,000.00, primarily used in starting his business. Part of the debt so incurred was in violation of the Order of this Court. The

Defendant shall hold the Plaintiff harmless for any and all portions of this debt.

21. In regard to personal property, the Court finds that Exhibits (A) are accurate and supported by the evidence and are awarded to the Plaintiff and Exhibits (B) are awarded to the Defendant. The Court, however, does not wish to disturb Domenic any further and, as to those items listed as Domenic's, they shall remain where they are at the time of this Decision. Plaintiff may remove her items from the marital residence on adequate notice to Defendant of at least ten (10) days.

22.The Defendant's pension at General Electric shall be divided in accordance with the formula set forth in Majauskas v. Majauskas, 61 NY 2d 481.

23. Since both parties are well educated and have earning capacity there will be no award of maintenance to either party, nor shall the Plaintiff be entitled to receive any interest in Defendant's present business or Defendant's property in Lyons, New York, in which Defendant's mother has a life estate.

24. Defendant shall not be entitled to any interest in the Plaintiff's Master's Degree,which the Plaintiff obtained during the course of the marriage, as Plaintiff was working at the time and contributing to the household.

25. The Defendant has caused the Plaintiff to incur unnecessary legal expenses while representing himself. Accordingly, Plaintiff is awarded 83,000.00 in attorney fees.

26. That the Plaintiff has taken all steps within her power to remove any and all barriers to Defendant's remarriage.

27. That no Decree of Divorce has been obtained by either party against the other in this state, or in any state or territory of the United States, or in any foreign country or in any other Court of competent jurisdiction, nor is there any other action pending for such relief.

28. That the Defendant is not currently in the military service, nor

was he in the military service at the time of the commencement of this action.

CONCLUSIONS OF LAW

FIRST: The Plaintiff, Hiromi Sumiya Murtari, is entitled to a Judgment of Divorce against the Defendant, John Murtari, dissolving the marriage heretofore existing between the parties, pursuant to §170(1) of the Domestic Relations Law of the State of New York, to wit: Cruel and Inhuman Treatment.

SECOND: That this Court shall retain exclusive jurisdiction of this matter including modification and enforcement of child support.

THIRD: The Plaintiff shall have sole legal custody of the child Domenic subject to the Defendant's right to the following visitation: alternate weekends from Thursday at 5:00 p.m. until Monday at 7:00 p.m.; (the Defendant shall transport the child to school on the Monday following the weekend he has visitation after the child starts kindergarten); five weeks in the summer, but no more than three consecutive weeks; every Easter from Good Friday at 1:00 p.m. until Easter Sunday at 6:00 p.m.; every Christmas from Christmas Eve at 9:00 a.m. until December 26 at 9:00 a.m.; every Father's Day from 9:00 a.m. until 7:00 p.m.; Memorial Day, Labor Day and Thanksgiving in odd years and President's Day, Fourth of July and Columbus Day in even years from 9:00 a.m. until 7:00 p.m. The Defendant shall be permitted to take Domenic to church on all Sundays and is allowed two hours to do so, to be computed between the hours of 8:30 a.m. and 11:30 a.m., except when the Plaintiff has Domenic during her summer vacation schedule to Japan or other trips to Japan or on other special occasions in which the Plaintiff is out of town.

FOURTH: The Plaintiff shall always have New Year's Eve and New Year's Day and shall be entitled to take the child to visit Japan for special family occasions and for four weeks every summer with notice to the Defendant.

FIFTH: The Defendant shall pick up the child at the beginning of visitation and the Plaintiff shall pick up the child at the end of

visitation and the parties shall have reasonable phone contact with the child when the child is at the other party's residence.

SIXTH: The Defendant shall pay to the Plaintiff as and for child support, the sum of $120.00 per week retroactive to October 1, 1995 plus his pro rata share of child care and medical costs including the cost of insurance and uncovered medical and dental expenses. The Defendant's pro rata share is 60% and the Plaintiff's pro rata share is 40%. The Defendant shall receive a credit of $1,9000.00 for child support paid on October 2, 1996.

SEVENTH: The Defendant shall have the option of purchasing the marital residence
from the Plaintiff for the sum of $37,000.00 and if he does not choose to exercise his option within sixty (60) days of receipt of a certified copy of the Judgment and Decree of Divorce then the Plaintiff shall have thirty (30) days to exercise her option of purchasing the house from the Defendant for $37,000.00. If neither party exercises there respective option then the house shall be placed on the market for sale, and sold within six (6) months or then sold at auction and the net proceeds to be divided equally. Defendant shall remain responsible for the costs of the marital residence including mortgage, taxes, insurance, maintenance and repairs as long as he resides therein.

EIGHTH: The Plaintiff shall be entitled to a Judgment for Eighteen Thousand Two Hundred and Fourteen Dollars ($18,214.00) representing her share of marital assets that have been dissipated by the Defendant.

NINTH:. The parties shall distribute their personal property pursuant to the attached Exhibit "A" and Exhibit "B". Upon ten (10) days notice to the Defendant, the Plaintiff shall be entitied to enter the marital residence premises during the Defendant's occupancy to remove the items listed in Exhibit "A". Those items listed as Domenic's shall remain where they are at the home of this decision.

TENTH: The Plaintiff shall be entitled to a Majauskas share of the Defendant's
pension at G.E..

ELEVENTH: Neither party shall be entitled to receive maintenance from the other.

TWELFTH: The Defendant shall hold the Plaintiff harmless for any and all portions of the credit card debt he has incurred.

THIRTEENTH:The Plaintiff shall be entitled to a Judgment for Attorney's Fees in the amount of Three Thousand ($3,000.00) Dollars.

FOURTEENTH: That either party shall have the right to resume the use of his or her premarriage or any other former surname.

FIFTEENTH: That the Plaintiff has taken all steps solely within her power to remove any barriers to the Defendant's remarriage

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E N T E R

CHARLES T. MAJOR Justice of the Supreme Court

APPENDIX B - Judgment of State Supreme Court

At a Trial Term of the Supreme Court of New York, held in and for Onondaga County at Syracuse, New York on April 11, 12, 15, 16, 19, 1996 and September 27, 1996 and October 2, 1996.

PRESENT: HON. CHARLES T. MAJOR Justice of the Supreme Court STATE OF NEW YORK SUPREME COURT COUNTY OF ONONDAGA

HIROMI SUMIYA MURTARI, Plaintiff,

vs.

JOHN MURTARI,

Defendant.

JUDGMENT AND DECREF OF DIVORCE

Index No.: M-705-95

R.J.I. 33-95-3267

The above entitled action having been duly brought on for a Judgment of Divorce in favor of the Plaintiff and against the Defendant on the grounds of Cruel and Inhuman Treatment (DRL§ 170(1)), and the Summons and Verified Complaint bearing the notation "ACTION FOR A DIVORCE" having been filed on May 23, 1995 in the Onondaga County Clerk's Office and duly served on the Defendant on June 27, 1995 and the Defendant having served an Answer and Counterclaim and the Plaintiff having served a Reply; and a Note of Issue and Index Number having been duly filed; and the matter having come to be heard for a Trial on April 11, 12, 15,16, 19, 1996 and September 27,1996 and October 2,1996 before the HONORABLE CHARLES T. MAJOR, a Justice of the Supreme Court, and the Plaintiff having appeared with counsel, MAUREEN K. WALSH, ESQ., and the Defendant having appeared pro se, and the Law Guardian, JOSEPH A. LUPIA, ESQ. having appeared on behalf of the child and the Court having heard testimony from both parties and having reviewed and examined all of the evidence and prior pleadings

in this matter and duly deliberated upon the same, and having made and filed a Decision

containing Findings of Fact and Conclusions of Law and deciding, among other things, that the Plaintiff is entitled to a Judgment against the Defendant dissolving the marriage heretofore existing between the parties on the grounds of Cruel and Inhuman Treatment,

NOW, after due deliberation; it is hereby

ORDERED, ADJUDGED AND DECREED that the Plaintiff Hiromi Sumiya Murtari, is entitled to and granted a Judgment against the Defendant John Murtari, dissolving the marriage heretofore existing between the parties on the grounds of Cruel and Inhuman Treatment; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff Mother, Hiromi Sumiya Murtari, is granted sole legal and physical custody of the child Domenic Kazu Murtari, born February 11, 1993, and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant shall have visitation on alternate weekends from Thursday at 5:00 p.m. to Monday at 7:00 p.m. and the Defendant shall transport Domenic to school on the Monday following the weekend he has visitation, when ever Domenic starts kindergarten. Additionally, the Defendant shall have five (5) weeks of exclusive visitation during the summer, but no more than three consecutive weeks at any one time; every Easter from Good Friday at 1:00 p.m. until Easter Sunday at 6:00 p.m.; every Christmas from Christmas Eve Day at 9:00 a.m. through December 26th at 9:00 a.m.; every Father's Day from 9:00 a.m. until 7:00 p.m., and Memorial Day, Labor Day and Thanksgiving in odd years, and President's Day, Fourth of July and Columbus Day in even years from 9:00 a.m. to 7:00 p.m. Defendant shall be permitted to take Domenic to church on all Sundays and is allowed two hours to do so, to be computed between the hours of 8:30 a.m. and 11:30 a.m., except when the Plaintiff has Domenic during her summer vacation schedule to Japan or other trips to Japan or on other special occasions in which the Plaintiff is out of town; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant shall be allowed reasonable telephone contact with Domenic when at the

Plaintiffs residence, and the Plaintiff shall be allowed reasonable telephone contact with Domenic when he is at the Defendant's residence; and it is further

ORDERED, ADJUDGED AND DECREED that the child Domenic shall be able to travel with the Plaintiff to Japan for four (4) weeks each summer, and Plaintiff must notify Defendant by May 1st of each year as to when the summer Japan trip will occur and the Plaintiff may visit Japan with Domenic on special occasions once each year, but not for longer than ten days and the Plaintiff must give the Defendant thirty (30) days notice; and it is further

ORDERED, ADJUDGED AND DECREED that if the parties cannot agree upon transportation for visitation, the Plaintiff shall deliver Domenic to the Defendant at the beginning of visitation, and the Defendant shall return the child at the end of the visitation; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant is ordered restrained from visiting the Child Care Center at any time and once Domenic starts Kindergarten the Defendant is no longer restrained so long as any visits are not disruptive and he has the permission of the school authorities; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant has the option of purchasing the house from the Plaintiff for the gross sum of $37,000.00 within sixty (60) days of receipt of a certified copy of the Judgment and Decree of Divorce and, if he does not choose to purchase the house, then the Plaintiff shall have thirty (30) days to exercise her option of purchasing the house from the Defendant for the gross sum of $37,000.00. To exercise their respective option, the parties must provide written notice to the other party by certified mail with return receipt requested. If either party is unable to obtain financing of the purchase within forty-five (45) days of exercising their respective option, their option shall be null and void. If neither party exercises their respective option to purchase the house, then the house shall be placed on the market for sale, and sold within six (6) months, or then sold at auction, and the net proceeds to be divided equally between the parties; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant remains responsible for the costs and expenses of the marital residence including mortgage, taxes, insurance, utilities, repairs and maintenance until the premises are sold or transferred to the Plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant is capable of earning income in excess of $40,000.00 per year and, as such, the Defendant shall pay child support in the sum of $120.00 per week, retroactive to October 1, 1995, plus a pro-rated share of child care and uncovered medical and dental costs and insurance for Domenic and that the Plaintiff has an earning capacity based on her education and present employment of $26,000.00 per year and the Court determines the pro-rated share for child care and uncovered medical/dental insurance and expenses for the child to be 40% for Plaintiff and 60% for Defendant; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant owes child support from October 1, 1995 to September 30, 1996 in the amount of $6,240.00 with a credit of $1900.00 paid on October 2, 1996 for a Judgment of child support arrears of $4,340.00 as of September 30, 1996; and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintitf is granted a Judgment for the amount of $18,214.00 against the Defendant for dissipated marital assets and; it is further

ORDERED, ADJUDGED AND DECREED that the Defendant shall hold the Plaintiff harmless for any and all portions of the credit card debt that he has incurred; and it is further

ORDERED, ADJUDGED AND DECREED that the personal property listed in Schedule "A" are awarded to the Plaintiff and those listed in Scheduled "B" are awarded to the Defendant, but as to those items listed as Domenic's, they shall remain where they are at the time of this Decision and Plaintiff may remove her items from the marital residence on adequate notice to Defendant of at least ten (10) days; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant's pension at General Electric shall be divided in accordance with the formula set forth in Majauskas v. Majauskas, 61 NY 2d 481; and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff shall not be entitled to receive any interest in the Defendant's business or Defendant's property in Lyons, New York; and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant shall not be entitled to any interest in the Plaintiff's Master's Degree; and it is further

ORDERED, ADJUDGED AND DECREED there will be no award of maintenance to either party; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff is awarded $3,000.00 in attorney fees; and it is further

ORDERED, ADJUDGED AND DECREED that any and all future questions on this matter, except those having to do with interpretation and equitable distribution, including issues of modification, custody and child support are referred to the Family Court having jurisdiction therein.

ORDERED, ADJUDGED AND DECREED that either party may resume the use of their premarriage or any former surname.

Dated: March 26, 1997
Syracuse, New York.
ENTER
/S Charles T. Major
Justice of the Supreme Court

Sharon R. Renk
Deputy County Clerk

APPENDIX C - Appellate Division Decision

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT
SUPREME COURT OF THE STATE OF NEW YORK

0495 PRESENT: PINE, J. P., HAYES, WISNER, PIGOTT AND BOEHM, JJ.

HIROMI SUMIYA MURTARI, RESPONDENT, V

JOHN MURTARI, APPELLANT.

(APPEAL NO. 1.)

John Murtari having appealed to this Court from the judgment of the Supreme Court, entered in the Onondaga County Clerk's office on April 3, 1997, and said appeal having been argued by John Murtari, appellant, Maureen Walsh of counsel for respondent, submitted by Joseph Lupia, Jr., Law Guardian, and due deliberation having been had thereon,

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed without costs and counsel fees on appeal are awarded.

Memorandum that is hereby made a part hereof.

Entered: April 29, 1998

CARL M. DARNALL, Clerk

APPENDIX D - Appellate Division Memorandum

SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department

0495. (Onondaga Co.) -- HIROMI SUMIYA MURTARI, RESPONDENT, V JOHN MURTARI, APPELLANT. (APPEAL NO. 1.) -- Judgment unanimously affirmed without costs and counsel fees on appeal awarded.

Memorandum:

The parties were married on November 21, 1987 and have one son, who was born on February 11, 1993. Plaintiff commenced this divorce action in May 1995. After a nonjury trial in which defendant represented himself, Supreme Court granted plaintiff a judgment of divorce on the ground of cruel and inhuman treatment; awarded plaintiff sole custody of the child with visitation to defendant; imputed annual income of $40,070 to defendant and directed him to pay child support in the sum of $120 per week retroactive to October 1, 1995; directed defendant to pay his pro rata share of child care expenses and uncovered medical and insurance costs for the child; and awarded plaintiff a judgment of $4,340 for child support arrears and $18,214 for defendant's dissipation of marital assets. It also granted defendant the option to purchase plaintiff's share of the marital residence for $37,000 and, in the event that defendant did not exercise that option within 30 days, granted plaintiff the option to purchase defendant's share for that amount. The court further directed that, if neither party exercised the option, the marital residence was to be sold and the proceeds divided. The court also equitably divided the parties' personal property and resolved other financial issues. Defendant raises numerous issues on appeal, none of which requires reversal.

Although we agree with defendant that the court improperly admitted into evidence the report of the court-appointed psychologist because the report was not submitted by the expert under oath and the expert was not present and available for cross-examination (see, 22 NYCRR 202.16 [g]), we conclude that reversal is not required on the issue of custody. The court's determination that the best interests of the child warrant the award of custody to plaintiff is supported by admissible evidence without consideration of the improperly admitted report (see,

e.g., Matter of Cynthia C. [Rebecca K.], 234 AD2d 929; see generally, Eschbach v Eschbach, 56 NY2d 167).

We reject defendant's contentions that the court improperly admitted into evidence the testimony of plaintiff's treating psychologist, that the court improperly awarded plaintiff a judgment of divorce on the ground of cruel and inhuman treatment, that the Law Guardian was biased against defendant and should have been disqualified, that the court's distribution of the parties'personal property was improper and that the court erred in imputing annual income of $40,000 to defendant for purposes of determining his child support obligation. We further reject the contentions of defendant that he was deprived of his right to counsel and that the court erred in denying his requests for an award of counsel fees. The court properly declined to make a distributive award to defendant of the value of plaintiff's enhanced earning capacity attributable to the master's degree earned during the marriage because defendant failed to offer proof of its value (see, Iwahara v Iwahara, 226 AD2d 346, 347) or that he made a substantial contribution to it (see, Duspiva v Duspiva, 181 AD2d 810, 811, lv denied 80 NY2d 752, rearg denied 80 NY2d 926). The contention of defendant that he was improperly deprived of his right to a trial by jury is not properly before us (see, Matter of Commissioner of Social Servs. of County of Erie [Lange] v Crowden, 166 AD2d 888; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B,

CPLR C5501 :6, at 21). Although defendant filed a notice of appeal dated April 2, 1996 from the order denying his motion for a jury trial as untimely, he failed to perfect that appeal timely. As a result, it was dismissed as abandoned (see, 22 NYCRR former 1000.3 [b] [2] [i]). Finally, we exercise our discretion to direct that defendant pay plaintiff's counsel fees generated by these appeals (see, Lawton v Lawton, 239 AD2d 866; Rados v Rados, 133 AD2d 536). Application to fix the amount of those counsel fees must be made to the trial court (see, Lawton v Lawton, supra). (Appeal from Judgment of Supreme Court, Onondaga County, Major, J. - Divorce.) PRESENT: PINE, J. P., HAYES, WISNER, PIGOTT AND BOEHM, JJ. (Filed Apr. 29, 1998.)

APPENDIX E - Appellate Division Motion for Rehearing

APPELLATE DIVISION OF THE STATE OF NEW YORK
FOURTH DEPARTMENT, COUNTY OF ONONDAGA

AFFIDAVIT IN SUPPORT OF MOTION FOR REARGUMENT
Index No. M-705-95
Docket No. CA 97-3119/3120

HIROMI SUMIYA MURTARI,
Plaintiff/Respondent,
- against -
JOHN MURTARI,
Defendant/Appellant

State of New York)
County of Onondaga) ss:

I. JOHN MURTARI, being duly sworn, deposes and states:

II. I am the defendant/appellant in this action, and I make this affidavit in support of my motion for reargument of the appeal.

Background

III. Justice Pine, Justice Boehm, Justice Hayes, Justice Pigott, and Justice Wisner, I make this Motion for Reargument aware of the slim chances it will have for approval, but hopeful you will thoughtfully consider my request, and as your title indicates, "Justice" will be served. Certainly, I am not a Lawyer and not studied in the "Law & Process", but I do have a lively sense of "Justice" and am concerned there may be a divergence between our "Law & Process" and the goals of "Justice" in Family Law.

IV. I wish to preface my remarks by stating I have also closely reviewed the "record", one I have lived – and while admitting the possibility of blindness to my own "hidden faults", I must still conclude there is no reasonable basis to support this Judgment **and** the process by which it was made -- nor the pain it has visited on my family (and many, many other families!).

V. I also affirm my respect for the people involved. I don't see any "evil" people here, but good people. The present "system" makes it all too easy for good people to fall into the simple trap "the end justifies the means." And these good people can cause very real harm to others.

Misapprehension of the Facts.

VI. Justice Pine, it was with apprehension that I noted during my Oral argument that you alone appeared to have any working knowledge of the record, or had even read the Briefs. While I honestly did not expect anyone on the Panel to read the actual transcripts, or review the entire list of exhibits. It never occurred to me some of the Justices would not have a working knowledge of the Briefs – or I would have better structured my presentation to present a deeper review of the issues.

VII. I noted in the Memorandum the "unanimous" affirmation of the Judgment, and could not help but think about a Civil Jury in which five of the jurors were busy with appointments and other matters to be present for most of a trial. The five then make an appearance during closing arguments, and during deliberations rely on the opinion of the one full-time Juror to form their opinions. The Appellate Review process calls for a panel of Justices to review what happened and form their own conclusions, did that happen here?

VIII. Justice Boehm, you were the only other Justice to speak, and you talked about the "desire to maintain stability for the child". I think you were surprised to find out I was the parent who remained in the home, in the nice neighborhood. You didn't speak again. Justice, I was confident you, as a professional, would have really taken the time afterwards to review the Briefs and the Record to find out what happened for yourself.

IX. Justices Hayes, Pigott, and Wisner – I was pleased to see your attention as I was speaking. During the earlier cases presented I appreciated your insightful questions of the litigants as you attempted to confirm your suspicions regarding the correct facts & law, versus their knowledge. How I wish that same attention and preparation had been brought to my presentation.

X. Justices, my sincere apologies if I am mistaken (I can appreciate what it is like to be falsely accused). Also, with humility, I can understand that perhaps the facts were overwhelmingly clear in this matter.

XI. I ask the Court to review my point arguments: failure to have opportunity for Counsel, rushed and incomplete discovery, unethical practice by professional participants in the process, and a large amount of clear evidence regarding the warmth and depth of the relationship between Domenic and I, and to find review and reargument would be justified.

Misapplication of a Controlling Principle of Law.

XII. Justice Pine, I was surprised by your questioning regarding the earlier appeal I had filed. I noted in the Memorandum that it was used as the basis to deny the "constitutional" issues involved..

XIII. The "trigger" for the Appeal which was noticed shortly before the actual Trial date was the rejection by the Trial Judge of my motion to Vacate the Note of Issue (and for other relief). I then filed a show cause order with Judge Lawton in Syracuse in an attempt to get the Trial delayed/stayed. I was surprised when Judge Lawton called me at home to explain he had reviewed my paperwork, but the Court could not stop the scheduled trial, and I could pick up the paperwork at his office, and since the Trial was going to happen anyway, to then appeal after the completion.

XIV. Justices, that was two years ago, and I don't recall the exact conversation, but the essence of the communication to me was this is bad timing, wait till your trial is done, and then, if necessary, appeal. I reviewed your cited case, *Matter of Commissioner of Social Servs. Of County of Erie [Lange] v Crowden, 166 AD2d 888*, and ask the court to consider the differentiating items of both timing & Court communication. In this case the Trial commenced almost within a month of the order leaving very little time to perfect an appeal – and post trial would have made for a confusing series of appeal.

XV. Also, the Constitutional issues brought on this appeal are based on the Trial itself. The failure of the CPLR to allow for a Jury on the issue of grounds & custody, the extra-judicial conduct of the Law Guardian by introducing new factual material after the conclusion of trial, the repeated denial of Counsel even after clear evidence was introduced at Trial regarding financial resources, etc..

XVI. With regards to Dr. Black's report being introduced into evidence without her testimony, you *cited Matter of Cynthia C. [Rebecca K.] 234 AD2d 929*, in the cited case their was overwhelming and "clear evidence" of the conduct, which did not require the corroboration of another report. In this case, the evidence

is certainly not "clear". The direct witness and videotape testimony clearly conflicts with Dr. Black's report. The only other "expert" that did testify was Dr. Hoenig, and she was later give a Letter of Reprimand by the Psychological Association for her conduct in this matter.

Conclusion

XVII. Justices, during my Oral presentation I spoke about how the Jury is essential to protecting the integrity of our Judicial Process. Experienced professionals in this matter acted the way they did because "it worked, and they could get away with it."

XVIII. In my Reply Brief I noted the misinformation used by Ms. Walsh (Plaintiff's Counsel), in her brief. Justice Pine, during your questioning of Ms. Walsh, it appeared you also noticed she had made representation to items which were not supported by your reading of the record (and you did not seem pleased!).

XIX. I will soon be submitting an ethical complaint regarding Ms. Walsh's conduct, and I had hoped such conduct would also have been noted in your Memorandum. While I am sure there must have been some "back-channel" communication with Ms. Walsh to let her know your feelings – I hope the Court will recall the issue and update the Memorandum accordingly.

XX. It is with some "wry amusement" I recently received Motion Papers from Ms. Walsh to the Trial Court, for some $10,000 in fees associated with the appeal, *for a job well done?* Why do professionals do this – because it works.

Consequences

XXI. In the last 7 days I have received a "barage" of motions/actions from Ms. Walsh:

A. Hiromi wishes to relocate to Colorado this July, with Domenic, so she can go to school.

B. My 81 year old mother finds out here savings account (which has about $5500), and to which her Social Security check is deposited, has been put on "freeze" by Ms. Walsh. The account came up at Trial, it is a joint account with my name, but I have never put my money in the account – and just have my name on it to handle potential burial expenses for my mom.

Domenic still asks me, "Daddy, when can I spend more time with you?"

XXII. The "unanimous affirmation" of the Court is cited as justification. Is this Justice?

_____

\S JOHN MURTARI

Sworn to before me this
28th day of May, 1998.
\S _____
Notary Public

APPENDIX F - Appellate Division Order Denying Rehearing

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NOS. 495-496/98

PRESENT: PINE, J. P., HAYES, WISNER, PIGOTT, JR., AND BOHEM, JJ.

HIROMI SUMIYA MURTARI, RESPONDENT,
V
JOHN MURTARI, APPELLANT.

Appellant having moved for reargument of the orders of this Court entered April 29, 1998,

Now, upon reading and filing the affidavit of John Murtari sworn to May 29, 1998, the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied.

Entered: July 8, 1998

CARL M. DARNALL, Clerk

APPENDIX G - Jurisdictional Statement Supplied to New York State Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

JURISDICTIONAL STATEMENT PURSUANT TO RULE 500.2

Index No. M-705-95

Hiromi Sumiya Murtari,

Plaintiff-Respondent

-- against --

John Murtari,

Defendant-Appellant

(1). The title of the action is as set forth in the caption. There has been no change in the parties since the commencement of this action.

(2). This appeal is taken from the Appellate Division of the Supreme Court, Fourth Department.

(3). The Notice of Appeal to this Court was served on 20 May 1998 and filed on 20 May 1998.

(4). The original Judgments appealed from were serviced by U.S. Mail from the Appellate Division , dated April 29, 1998, and the Judgment was entered on April 29, 1998.

(5). The name and address of the attorney for the Plaintiff-Respondent is:

Ms. Maureen Walsh, Esq.
472 S. Salina Street, Suite 602
Syracuse, NY 13202-2480

(6). Appended to this statement are copies of the following papers:

(Exhibit A). Dated Notice of Appeal.
(Exhibit A). Judgment Appealed from.
(Exhibit B). Other orders brought up for review.
(Exhibit C). Memorandum from Appellate Division
(Exhibit D). Judgment of Trial Court.
(Exhibit E). Findings of Trial Court.

(7). This Court has jurisdiction to entertain the appeal and to review the questions raised since they involved the construction of the Constitution of the United States.

Justices, I have been forced to pursue my defense "pro se". I have spent a great deal of time reviewing procedures to insure these documents facilitate a rapid review on your part. I will speak in "plain english" in these brief paragraphs to communicate what I feel is the essence of this Appeal, and why it fall as a matter of "right" to the Court of Appeals.

I believe the record will show that I am a good person, a good spouse, and most of all, a good parent. It will show unambiguous evidence of my community involvement, and close relationship with my child. If I wasn't watching this happen with my own two eyes, I would not believe it possible. Especially the trauma our son Domenic has been put through.

As I went through the process you will follow I found myself stripped of dignity, reputation, property, and most of all, my relationship with Domenic. I watched experts/professionals with a great deal of experience relying more on "intuition" than "evidence". Professionals who staked out early positions, and then just did not move.

I saw a frightening lack of regard for "due process" (as required by the Fifth Amendment), it appeared we were marching toward a predetermined goal. There was no doubt how Judge Major felt when

we met in chambers right before Trial began. I certainly felt that as a "man", I did not get "equal protection".

Justices, as you well know, you control the ball in these matrimonial affairs. The attorneys have no recourse to a Jury, and so, at the cost of all else, must stay in your good graces. It is a frightening amount of power, and I think it is one that our Constitution places a check upon by the use of a Jury. The CPLR of New York denies it's citizens that right (one that I feel is "preserved" to our citizens by the Ninth/Seventh and Fourteenth Amendments.

Given the evolution of Matrimonial Law since the time of the founding fathers, I believe it is time we realize that a parent has a right to be with their child (and same for the child). Again this is a right preserved to the people. If a party wishes to challenge that, they must convince a Jury beyond a reasonable doubt. While this may appear "revolutionary", I feel it's time may have come. The need to convince a Jury would reduce the horrendous amount of groundless allegations that get made. And it also recognizes the equality of both sexes.

To help your understanding of this case I have included all the Appellate Briefs filed in this matter as separate attachments. They contain extensive references/excerpts from the record, and should give you a "flavor" for the entire proceeding.

(7a) Constitutional References

1. **Fifth Amendment** - . . . nor be deprived of life, liberty, or property, without due process of law . . .

2. **Seventh Amendment** - In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

3. **Ninth Amendment** - The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. . . **Declaration of Independence** - We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

4. Fourteenth Amendment - . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal **protection of the laws. . .**

(7b) Point Headings

1. Was the Defendant unfairly denied funds so that he could secure representation of Counsel, and did he not have a Constitutional right to Council in a proceeding which could separate him from his child?
ANSWER: Trial Court denied requests for Counsel on numerous occasions.

2. Was the Defendant improperly denied his Constitutional right to a Trial by Jury, not only on the issues of grounds, but also on the issues of Custody and Property Distribution?

ANSWER: Trial Court denied request as part of same motion, 4/15/97.

3. Should the Defendant's objections regarding Dr. Hoenig's testimony, with regards to hearsay, identified expert, and the introduction of her report into evidence, been sustained?
ANSWER: During trial, objections of Defendant were overruled by the Court.

4. Were the Defendants Constitutional rights to "due process" and ability to confront an accuser violated. Should the Plaintiff have been allowed to enter the report of Dr. Lois Black, Court appointed psychologist, into evidence without her oral testimony and opportunity for cross examination.
ANSWER: Trial Court overruled objection by Defendant.

5. Should the Note of Issue been vacated and the Defendant given more time to complete discovery and should the Plaintiff been compelled to sign release forms for counselors who had advised the couple?
ANSWER: On a motion heard 4/15/97 and on 9/10/97, Trial Court

found there had been time and no signature of forms was required.

6. Should a mistrial have been granted when the Defendant produced a letter from the Central New York Psychological Association reprimanding Dr. Hoenig for unprofessional conduct in this matter?
ANSWER: Trial Court refused to sign Show Cause order dated 10/15/96.

7. Did the Law Guardian demonstrate a pattern of conduct consistent with unjustified bias against the Defendant and did his ability to introduce "facts" after conclusion of trial, not subject to cross examination violate the Defendant's Constitutional rights to "due process" and ability to confront an accuser.
ANSWER: In several motions, Trial Court refused to assign a new Law Guardian.
Ignored objections to written report.

8. Did the evidence presented at trail support a finding by the Trial Court of "cruel & inhuman" treatment on the part of the Defendant, was there a fair distribution of property?
ANSWER: Trial Court found preponderance of evidence to justify "cruel & inhuman" finding.

9. Was there enough evidence to support the Custodial finding of the Trial Court, were not the Defendant's and Child's Constitutional right's violated when a determination was made on just a "preponderance of the evidence" versus a standard of "beyond a reasonable doubt.", and without an option for a Jury.

Dated: 28 May 1998

John Murtari, *pro se*
45 East Oneida Street
Baldwinsville, NY 13027
(315) 638-7426

APPENDIX H - New York State Court of Appeals, Order Denying Review

State of New York, Court of Appeals

At a session held at the Court of Appeals Hall in the City of Albany on the thirty-first day of August, 1998.
Present, Hon. Judith S. Kaye, Chief Judge, presiding
Mo. No. 1074 SSD 51

Hiromi Sumiya Murtari,
Respondent,
v
John Murtari,
Appellant

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

/S Stuart M. Cohen
Clerk of the Court

APPENDIX I - Trial Court - Issue of Jury Raised.

*** Excerpt from Appellate Brief, references to Exhibits below are not included in this petition.*

DENIAL OF JURY TRIAL

It was a well known fact to both parties that Mr. Murtari wanted a Jury to decide the issues of grounds. The knowledge went so far as to be used by the plaintiff as another accusation against Mr. Murtari's conduct. In early March the defendant received a response to written interrogatories from the Plaintiff and also a notice that a Note of Issue(R-265) had been filed on February 21st. He immediately wrote a letter to the Court (R-200), dated March 5th, and expressed his desire for a Jury. A motion to Vacate the Note of Issue was filed by the defendant on March 11th (R-201).

Green v. Siben 480 AD2d 923, found that late filing of Jury demand was excused based on factual showing that earlier waiver of right was result of inadvertence or other excusable conduct indicating lack of intention to waive such right. In a similar vein, *Fryer v. Connor 152 AD 249, found that if failure to file timely notice was due to inadvertence and correction of such error would not prejudice plaintiff's right, defendant would be permitted to serve and file a demand for jury.*

Honest Mistake

The defendant simply did not understand that filing a Jury Demand did not indicate readiness for trial, but was just a notice. The defendant wanted the Note Of Issue vacated, and was under the mistaken impression that to file a Jury Demand would be indicating he thought the matter was ready for trial.The Judge delivered a written order denying the request on March 27th (R-265); however, Mr. Murtari did still file the Jury Demand on April 2nd (R-268), and on the first day of Trial requested that a jury be drawn (T1-5), this was also denied:

MR. MURTARI: Your Honor, I would ask that we delay and have time to impanel the jury, Your Honor, it was, it's been clear I think all during this proceeding, the plaintiff has been well

aware that I desired a jury trial. I think when the note of issue was filed you know my letter to you, I noted my desire is for a jury, and that some of those follow-up affidavits, Your Honor, technically I screwed up by not filing that jury demand. Since then it's been done within a week of your decision not to vacate, I did file the jury demand. You know I am here disputing the grounds. I am not countersuing for divorce. That's a significant right for me to have that heard by a jury. And you know, I am asking the Court to please reconsider that I know I have got your order we had previously made a decision.

THE COURT: We have already ruled on that. Unless the other side consented I can't change that. So that motion is also denied. We can proceed.

APPENDIX J - Trial Court - Issues of Right to Counsel Raised

*** Excerpt from Appellate Brief, references to Exhibits below are not included in this petition.*

In numerous requests the defendant requested representation by Counsel, with the suggested method being a "pool" of funds which both parties could access. There is clear precedence for a "level playing field" between spouses. Instituted to protect a financially destitute spouse from being "raped" by the other spouse in a proceeding where they could not afford attorney's, expert witnesses, and the like. This is directed by DRL 237 (a), and in perhaps the "clearest" summary, *Dikranian v. Dikranian 263 AD 128, found that when a spouse assails the validity of a marriage and seeks to destroy a relationship which has existed between parties for several years, the other spouse should be afforded means of defending themselves in such action.*

Financial Condition of Defendant

On numerous occasion throughout the proceeding Defendant requested funds for Counsel: Pre-trial motions heard Sep 12, 1995 (R-110), Nov 21, 1995 (R-154), during break in Trial Sep 10, 1996 (R-282). These requests were denied on every occasion. Probably the most severe example of this was during the closing of trial, Oct 2, 1996 (T2-214), when Defendant had given detailed testimony (T2-27 thru T2-99) to his financial state and discussed his Statement of Net Worth (R-626) and a draft of his 1995 tax return (R-641). Examination by the Court and Opposing Counsel failed to show any other assets, even after complete discovery. The defendant even showed that the Plaintiff had at least $20,000 in funds that were transferred from her accounts to another man (T1-358) and not accounted for.

Practical Necessity of Counsel in Matrimonial Law

Lack of Counsel was a hammer blow to this **entire family** receiving Justice. Mr. Murtari, with an excellent educational record and work experience, certainly represents the best of what natural resources a "pro se" defendant could have. Yes, Mr. Murtari did read the practice books, but their is no substitute for trial experience. What this case makes crystal clear is that a "pro se" defendant has little hope for a fair outcome in current matrimonial procedure. These

proceeding are rarely heard by Jury, and there is a de facto system of negotiation between Judges and counsel for each side. The Law Guardian often plays the role of "tie breaker", and occasionally an expert may be consulted. Without representation of Counsel, Mr. Murtari could not participate in these negotiations as an equal. The rulings during trial and also pre-trial motions show a disturbing pattern developing. The defendant requests relief from the Court and provides rationale and factual detail. The plaintiff make a "cursory" or even no response to the issues raised by the defendant, and the relief is denied.

APPENDIX K - QUESTIONS RAISED ON APPEAL TO APPELLATE DIVISION

1. Was the Defendant unfairly denied funds so that he could secure representation of Counsel, and did he not have a Constitutional right to Council in a proceeding which could separate him from his child?
   ANSWER: Trial Court denied requests for Counsel on numerous occasions.
2. Was the Defendant improperly denied his Constitutional right to a Trial by Jury, not only on the issues of grounds, but also on the issues of Custody and Property Distribution?
   ANSWER: Trial Court denied request as part of same motion, 4/15/97.
3. Should the Defendant's objections regarding Dr. Hoenig's testimony, with regards to hearsay, identified expert, and the introduction of her report into evidence, been sustained?
   ANSWER: During trial, objections of Defendant were overruled by the Court.
4. Were the Defendants Constitutional rights to "due process" and ability to confront an accuser violated. Should the Plaintiff have been allowed to enter the report of Dr. Lois Black, Court appointed psychologist, into evidence without her oral testimony and opportunity for cross examination.
   ANSWER: Trial Court overruled objection by Defendant.
5. Should the Note of Issue been vacated and the Defendant given more time to complete discovery and should the Plaintiff been compelled to sign release forms for counselors who had advised the couple?
   ANSWER: On a motion heard 4/15/97 and on 9/10/97, Trial Court found there had been time and no signature of forms was required.
6. Should a mistrial have been granted when the Defendant produced a letter from the Central New York Psychological Association reprimanding Dr. Hoenig for unprofessional conduct in this matter?
   ANSWER: Trial Court refused to sign Show Cause order dated 10/15/96.

7. Did the Law Guardian demonstrate a pattern of conduct consistent with unjustified bias against the Defendant and did his ability to introduce "facts" after conclusion of trial, not subject to cross examination violate the Defendant's Constitutional rights to "due process" and ability to confront an accuser. **ANSWER**: In several motions, Trial Court refused to assign a new Law Guardian. Ignored objections to written report.
8. Did the evidence presented at trail support a finding by the Trial Court of "cruel & inhuman" treatment on the part of the Defendant, was there a fair distribution of property? **ANSWER**: Trial Court found preponderance of evidence to justify "cruel & inhuman" finding.
9. Was there enough evidence to support the Custodial finding of the Trial Court, were not the Defendant's and Child's Constitutional right's violated when a determination was made on just a "preponderance of the evidence" versus a standard of "beyond a reasonable doubt.", and without an option for a Jury.